APPENDIX

Opinion of Appellate Term, Second Department

By DiGiovanna, Gulotta and Baker, *JJ.*

Judgment of conviction affirmed. No opinion.

DiGiovanna and Baker, JJ., concur.

Gulotta, J., dissents and votes to reverse with the following memorandum:

I dissent from the affirmance of the conviction herein. In my opinion it was error both to exclude testimony of contemporary community standards and, secondly, to exclude the proffered proof of defendant's familiarity with other books which had previously withstood court test, and upon which defendant relied in arriving at his decision to include the instant book in his stock.

The former was relevant on the basic issue of obscenity and the latter on the issue of scienter.

In People v. Richmond County News (9 N. Y. 2d 578, at page 586) the court said:

"Mindful of the constitutional necessity to open the door barring state intrusion into this area, 'only the slightest crack necessary' (Roth v. United States, 354 U. S. 476, 488, supra), and desirous of erecting a standard which embodies the most universal moral sensibilities and may be applied objectively, we are of the opinion that the prohibitions of section 1141 of the Penal Law should apply only to what may properly be termed 'hard-core pornography.'"

Since this case settles that the statute can and does only deal with hard-core pornography, I think it too sweeping a conclusion to hold that People v. Finkelstein (11 N. Y. 2d 300) bars proof of community standards in hard-core cases, since that is the only type that can be prosecuted. While a trial judge may decide that material is so manifestly obscene that the People have made out a case without proof of community standards, he should not refuse a proffer of such proof by defendant on the theory that the issue is closed because of his personal opinion.

It seems to me that the correct approach is set forth in Judge Van Vorhees' concurring opinion, page 307:

"In ascertaining what are contemporary community standards, I agree with Judge Dye that other books and publications may be compared which are currently sold by bookstores to the public. This aspect was considered in Smith v. California (361 U. S. 147) in the concurring opinions of Justices Frankfurter and Harlan. Justice Frankfurter stated:

'Since the law through its functionaries is "applying contemporary community standards" in determining what constitutes obscenity (Roth v. United States, 354 U. S. 476, 489), it surely must be rational, and therefore relevant to the issue of obscenity, to allow light to be shed on what those "contemporary community standards" are. *Their interpretation ought not to depend solely on the necessarily limited, hit-or-miss, subjective view of what they are believed to be by the individual juror and judge* * * *.

'For the reasons I have indicated, I would make the right to introduce such evidence a requirement of due process in obscenity prosecutions' (id. pp. 167-167)."

Justice Harlan, after stating his agreement with Justice Frankfurter, added (pp. 171-172):

"The community cannot, where liberty of speech and press are at issue, condemn that which it generally tolerates. This being so, it follows that due process—'using that term in its primary sense of an opportunity to be heard and to defend [a] * * * substantive right,' * * * requires a State to allow a litigant in some manner to introduce proof on this score. * * * *" (Emphasis supplied.)

As to the need to prove "scienter," in People v. Fritch (13 N. Y. 2d, 119), the court said, in dealing with a book which it held to be obscene (p. 126):

"There still remains for consideration and disposition the issue of scienter; for even though a publication is obscene, a conviction may not stand without proof of scienter on the part of those charged with a violation of section 1141 of the Penal Law."

Under the theory on which this case was tried, the "a priori" judgment of the trial judge that the book is "hard-core" pornography was accepted as final and conclusive and scienter was deduced from defendant's familiarity with the book without permitting him to show his personal familiarity with the subject of what had been legally adjudged pornographic.

Opinions of Court of Appeals

BREITEL, *J.*:

After judgment of conviction for violation of section 1141 of the Penal Law, and affirmance by the Appellate Term, one justice dissenting, defendant appeals. Defendant has paid the $250 fine imposed. The only issue of those raised by defendant's counsel on which there is stated disagreement in the Court is whether the subject publication is obscene under the statute.

Under the authoritative rules laid down by the courts, material that is offensive "focuses predominantly upon what is sexually morbid, grossly perverse and bizarre, without any artistic or scientific purpose or justification. Recognizable 'by the insult it offers, invariably to sex, and to the human spirit' * * * it is to be differentiated from the bawdy and the ribald. Depicting dirt for dirt's sake, the obscene is the vile, rather than the coarse, the blow to sense, not merely to sensibility. It smacks, at times, of fantasy and unreality, of sexual perversion and sickness and represents, according to one thoughtful scholar, 'a debauchery of the sexual faculty' " (*People* v. *Richmond County News*, 9 N Y 2d 578, 587). See, generally, *Roth* v. *United States* (354 U. S. 476, 488-489) for the prurient appeal test; and *Mishkin* v. *New York* (383 U. S. 502, 508) holding that "where the material is designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large, the prurient-appeal requirement * * * is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group". The new Penal Law provision not yet effective is interesting and valuable because the draftsmen sought to restate

the most recent decisional rules. Section 235.00 defines the obscene as

> "Any material or performance is 'obscene' if (a) considered as a whole, its predominant appeal is to prurient, shameful or morbid interest in nudity, sex, excretion, sadism or masochism, and (b) it goes substantially beyond customary limits of candor in describing or representing such matters. Predominant appeal shall be judged with reference to ordinary adults unless it appears from the character of the material or the circumstances of its dissemination to be designed for children or other specially susceptible audience." (Eff. September 1, 1967.)

Compare section 251.4 of the A.L.I. Model Penal Code.

The instant pamphlet consists of 70 pages with a centerleaf. Although styled *Grecian Guild Studio Quarterly*, and numbered, it is not clear that it is a periodical. The page dimensions are 8⅝ by 5¼ inches. The pamphlet contains 70 full page photographic reproductions including the covers. There is no text except for two pages of advertising data with reference to subscriptions for photographic prints, and the centerleaf containing advertising blurbs or "reviews" of two books, entitled "Kept Boy" and "Dial P for Pleasure". All of the photographs are of two or more young men, and in nearly all, in various stages of undress or nudity, engaged in attitudes of embracing, wrestling, spanking, beating, or enforced disrobing of one of the young men. In some of the pictures, the ones indeed which are most violative of the statute, one of the young men is hardly more than a boy. Where genitalia would be exposed the area is rendered opaque by retouching. A few of the captions are suggestive.

Two of the photographs portray one young man manually soap-lathering the genitalia of the other. One por-

trays a young man trying to seize the genitalia of another. Two portray the young men in embracive posture consonant with and suggestive of an act of pederasty. There are three nude spanking scenes. There are several others depicting sadistic assaults. The disrobing and wrestling scenes are strongly suggestive of activity directed toward exposure or seizure of genitalia. These photographs in the context of the others in the pamphlet indicate that the pamphlet taken as a whole is designed to portray a full range of sexual behavior between young males from by-play to pederasty.

While the photographs portray something of action sequences in intimate relationships they otherwise tell no narrative. No redeeming social values are apparent and defendant's able counsel makes no claim to such values in the material. (See *Roth* v. *United States*, 354 U. S. 476, 484, *supra*.) No freedom of expression is involved because no development of ideas is directly or indirectly suggested.

Applying the tests as laid down in *People* v. *Richmond County News* (*supra*, at 586-587), and so long as there is a constitutionally valid legislative policy to control the obscene, the pamphlet must be held obscene.

Finally, if there were still any doubt as to the motivation for the publication and the purpose of its appeal, the centerleaf advertising would make them utterly clear. Referring to one of the books advertised it states "Here is a book with something for everybody—everybody with any of the known perversions, that is—and if the author * * *". One of the chapters is described as containing "a long and precise lesson on how to perform fellatio properly", belonging in "a gay sex manual". This language, of course, does not refer to the photographs but is addressed to the same audience as the photographs in the pamphlet in question and is therefore part of the relevant context.

MANUAL *Enterprises* v. *Day* (370 U. S. 478) is of no help to defendant. The footnote description of the material by the government in that case was characterized by the court as inaccurate. Presumably, if the description had been accurate the case might have been decided differently. Moreover, the instant case does not involve portraits merely of made nudes comparable to acceptable portraits of female nudes or to acceptable portraits of male and female nudes together. Photographs of similar sexual activity between made and female, without social justification or excuse, would be equally obscene.

Accordingly, the order should be affirmed.

FULD, *Ch. J.* (dissenting):

I subscribe, of course, to the test employed by the majority in ascertaining whether material is obscene or pornographic under section 1141 of the Penal Law (Opinion, p.) [Mimeo., p. 1] but I cannot agree with the conclusion that, under that test, the magazine before us is obscene. (See *People* v. *Richmond County News,* 9 N Y 2d 578.)

If it were to be judged in terms of my personal views of its social value, of its moral and aesthetic worth, I would condemn it for its vulgarity and its tawdriness. However, I am concerned not with its artistic merit but, rather, with its constitutional status and, as I wrote in the *Richmond County News* case (9 N Y 2d, at p. 588), "Basic principles of jurisprudence * * * command us to put to one side all personal predelictions" and to appraise the challenged writings or pictures "as objectively as is possible in the light of First Amendment concepts." It is my belief that the majority, placing emphasis on the maga-

zine's lack of social value and moral worth, has mistakenly equated "offensiveness" with "prurient appeal" (*United States* v. *Klaw*, 350 F 2d 155, 167) and "hard core pornography". (*People* v. *Richmond County News*, 9 N Y 2d 578, 586, *supra.*)

The overdrawn descriptions contained in the majority opinion make the pictures of the male models in this magazine seem to be something other than merely "suggestive". But, in point of fact, there is neither indecent exposure nor portrayal of a consummated lewd act; indeed, the photographs are no worse than the magazine pictures of female models which we have previously held not to be pornographic. (See, e.g., *People* v. *Moran*, 15 N Y 2d 926, *Larkin* v. *G. I. Distributors*, 15 N Y 2d 869; *Metzger* v. *Couper*, 15 N Y 2d 802.) As Mr. Justice Harlan remarked in *Manual Enterprises* v. *Day* (370 U.S. 478)—which involved magazines containing pictures of nude male models, some being posed in pairs—"the most that can be said of [such magazines] is that they are dismally unpleasant, uncouth, and tawdry. But this is not enough to make them 'obscene'" (p. 490, and see p. 489, n. 13; see, also, *Redrup* v. *New York*, 386 U.S. ; *One, Inc.* v. *Olsen*, 355 U. S. 371; *United States* v. *One Carton Positive Motion Pictures Film*, 367 F 2d 889; *United States* v. *Zindeveld*, 316 F 2d 873, 875-876, 881-882, cert. den. 376 U.S. 916.)

I would but add that, in affirming this conviction, the court is apparently assessing the magazine not with respect to its prurient appeal to the public at large but, rather, "in terms of the sexual interests of its intended and probable recipient group". (*Mishkin* v. *New York*, 383 U.S. 502, 509.) This is clearly improper as there is "no evidentiary basis [in the record] from which to 'recognize' an appeal to the prurient interest of the deviate or the typical recipient". (*United States* v. *Klaw*, 350 F 2d 155, 168, *supra.*) The First Amendment freedoms

of speech and press are too important and precious to be surrendered to "speculations and suspicions about the prurient appeal of material to some * * * undefined person whose psyche is not known". (*United States,* v. *Klaw,* 350 F 2d 155, 167, *supra.*)

In the view which I have taken, I find it unnecessary to consider the other arguments, also of constitutional dimension, which the defendant has advanced.

I would reverse the judgment and dismiss the information.

* * *

Judgment affirmed. Opinion by Breitel, *J.* All concur except Fuld, *Ch. J.,* who dissents and votes to reverse and to dismiss the information in an opinion.

Order of Court of Appeals Denying Motion for Reargument and Granting Motion Amending Remittitur

STATE OF NEW YORK

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the seventh day July, A. D. 1967.

Present:

HON. STANLEY H. FULD, *Chief Judge, presiding.*

[SAME TITLE]

A motion for reargument or, in the alternative, to amend the remittitur in the above cause to this Court having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion, insofar as it seeks reargument be and the same hereby is denied, and it is

ORDERED, that the said motion, insofar as it seeks amendment of the remittitur, be and the same hereby is granted, the return of the remittitur requested and, when returned, it will be amended by adding thereto the following:

> Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, viz.: Whether defendant-appellant's rights under the due process clause of the Fourteenth Amendment were violated. Defend-

ant argued that the material upon which the prosecution was based was not obscene, that there was a burden upon the People to produce evidence of contemporary community standards, and that it was necessary for the prosecution to prove that defendant had reason to believe that the material violated the law. The Court of Appeals held that the constitutional rights of defendant-appellant had not been violated.

And the Criminal Court of the City of New York, County of Queens, hereby is requested to direct its clerk to return said remittitur to this Court for amendment accordingly.

A copy.

Gearson Kimball
Deputy Clerk